

***United States Court of Appeals
for the Second Circuit***



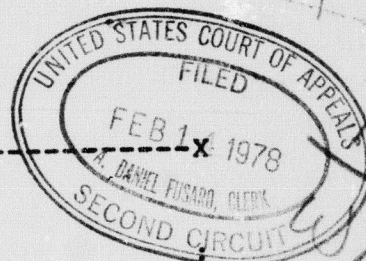
**APPELLANT'S
BRIEF**

770

77-6219

APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



MARSHALL P. SAFIR,

Plaintiff-Appellant,

-against-

ROBERT W. BLACKWELL, Assistant Secretary
of Commerce of the United States of
America,

and

JUANITA KREPS, Secretary of Commerce
of the United States of America,

and

AMERICAN EXPORT LINES: AMERICAN PRESIDENT
LINES, LYKES BROS. STEAMSHIP CO., INC.:
MOORE McCORMACK LINES, INCORPORATED:
UNITED STATES LINES, INC.; FARRELL LINES,
INC.: BLOOMFIELD STEAMSHIP CO.:
PRUDENTIAL STEAMSHIP CO., INC.

Defendants-Appellees.

Docket No.
77-6219

BRIEF FOR
PLAINTIFF-APPELLANT

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QUESTIONS PRESENTED

I. Whether the District Court erred in denying an amendment under Rule 15c of the FRCP on the grounds that the original complaint made no claim against any of the defendant carriers.

II. Whether the District Court erred in holding that the amendment does not arise out of the conduct set forth in the original complaint.

STATEMENT OF THE CASE

On December 20th, 1977, Judge John F. Dooling, Jr. of the U.S. District Court for the Eastern District of New York denied appellant's motion to amend his original complaint in Docket 68C643.

The memorandum, order, and annex A of Judge Dooling is attached hereto as Appendix A.^{P.1} The amended complaint of September 13, 1977 is attached hereto as Appendix B1.^{P.13} The affidavit of Marshall Safir's supporting the amended complaint Appendix B.^{P.35} The original complaint is attached hereto as Appendix C.^{P.62}

Judge Dooling's memorandum sets forth a succinct history of the Safir case as pertinent to its present posture (including the facts set forth in the excerpted deposition Annex A thereto, which will be a subject of a companion appeal in C/A77-7626 from the dismissal of Docket 77C1093). This spare, but pointed evaluation of the past ten years (pages 1-12) needs no embellishment from appellant's point of view, except to clarify that AGAFBO (the conference) also included Prudential Lines, Inc., Grace Lines (now part of Prudential Lines,) American President Lines and Farrell Lines, all of whom have been found in violation of Sec. 810 of MMA 1936 with the other lines named on pages 6-7 of Appendix A, all of whom were named in the original complaint (Appendix C, ^{P. 44} para VIII), but not as defendants until 1970.

Submitted in connection with Judge Dooling's history of the case and incorporated in Plaintiff's reply to opposition to his motion to amend (Appendix D ^{P. 44}) are the following:

1. Copy of Title Page and page 2 of Examiner's Report of April 24, 1972 setting forth the posture of the investigation of the "alleged" violation, the adversary nature of the proceeding, and the full representation of the carrier defendants (respondents) counsel listed on page 2) to insure that they were not prejudiced to maintain their defense on the merits.

2. Copy of affidavit and brief of this appellant (app. 91-98) in this Circuit Court in C/A Docket 72-1753 addressing the relationships of the False Claims Act 31 USC 231, 232, 235 (FCA) to a violation of Sec. 810 of the Merchant Marine Act 46 USC 1227 in 1972 (Safir v. Blackwell, et al. 469 F.2d 1062-1063) less than six years from the date of the decision in Docket 65-13 of the Federal Maritime Commission. It is noteworthy that the carriers American Export Lines, United States Lines, Moore-McCormack Lines and Prudential-Grace Lines, Inc. are recognized as defendants in the first sentence of this Court's per curiam decision. See Appendix D 3 page 100

ARGUMENT

Rule 15 of the Federal Rules of Civil Procedure, Title 28 U.S.C., and, specifically Rule 15(c), inter alia, provides:

"Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits

and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (Emphasis supplied).

A. The claim arose out of the conduct set forth in the original pleading.

The action in 68C643 pertains to conduct during an eleven-month period in 1965-1966 wherein as stated in the original complaint, the carriers named therein in paragraph "Eighth" (Appendix C, p. 3), and further identified in paragraph "ninth", these parties did commit violations of law as set forth in paragraph "eleventh" of the original complaint and for which plaintiff demanded recovery for the benefit of the United States of payments illegally made during the time period covered by the decision of the Federal Maritime Commission in Docket 65-13 (Appendix C, p. 47, plaintiff's demand for relief). Nothing has changed except to add the claim for doubling the amount of this recovery.

The original complaint sought an order of mandamus compelling an agency of the United States to take action for the benefit of the United States. In effect, plaintiff brought suit on behalf of the United States in 1968 and as stated in

his affidavit (Appendix B, p³⁷~~3-8~~), the United States was always the real party in interest in this case. As stated in Rule 17(a) of the FRCP, "...a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the United States...".

In this case, the wisdom of Rule 17 prevails to protect the United States from "a corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims", at the highest level of government (Appendix A, p. 14). Contrary to the opinion below, Appellant respectfully submits that Annex A of Judge Dooling's order is both germane to the False Claims amendment for additional damages and is essential to the understanding of the underlying reasons for a government agency to eschew the normal course of instituting a legal action demanded in the original complaint. By adopting the anomalous procedure of holding hearings to decide whether to sue and then settling before suit was instituted, they avoided facing the issue that the carriers filed false vouchers for subsidies, and

with no statutory provision pointed to which would authorize an adjudication of a contract dispute proceeded to mitigate such unwarranted settlement to a pittance.

B. The parties brought in by the amendment received notice, voluntarily intervened as defendants and indeed were subject to an order under Rule 19 of the FRCP if they had not joined as defendants. In this regard, it should be noted that this Court in Safir I supra, at footnote 4, stated as follows:

"...While the parties have not discussed in this court whether the AGAFBO lines were required to be joined as defendants, we are concerned that disposition of the action in their absence 'may...as a practical matter impair or impede' their ability to protect their interests in the subject matter of his litigation. F.R.Civ. P. 19. Accordingly, if the district court should require their joinder or if they should intervene, we would not wish the district court to feel that anything said in this opinion precludes its considering any new arguments which the AGAFBO lines may bring to its attention."

Later in the per curiam opinion of this Court on June 18, 1970 (see Appendix E, p. 104), the issue of notice to these defendants was put to rest by the following statement:

"Moreover, while we relied mainly on this point we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in a proceeding under Sec. 810 of the MMA of whose potentiality they were apprised very shortly after the FMC decision."

The carrier defendants are not strangers to the suit, as they participated in all administrative and judicial proceedings since that time. This Court noted their "sedulous" abstention in *Safir II*. Appellant submits that this abstention was based upon the knowledge that they had bought shelter behind the collusive cloak of the Secretary of Commerce. (103)

This Court's insistence that they come forward to protect themselves should suffice for showing that the criteria of Rule 15c has been met as to the FCA amendment as well.

A recent case should be dispositive of the first question presented. In Staren v. American National Bank & Trust Co. of Chicago, 529 F.2d 1257 (CA 7th 1976), the Court held that:

"...Amended complaint in a securities fraud action which substituted in place of the individual plaintiffs a corporation which they controlled related back to the filing of the original complaint and was improperly dismissed on the grounds that the statute of limitations had run. Notice is critical element involved in Rule 15(c) determinations, and the substituted corporate plaintiff had such an identity of interest with the individual plaintiffs that the original complaint served to notify the defendant of the actual claim being asserted against it, with no resulting prejudice to its interests. The amended complaint did not state a new cause of action, and the substitution of parties after the statute of limitations had run was not significant when the change was merely formal and in no way altered the known facts and issues upon which the action was based. Staren v. American Nat. Bank & Trust Co. of Chicago, 21 FR Serv 2d 414, 529 F.2d 1257 (CA 7th, 1976)..."

II.

Contrary to the opinion of the Court below, the False Claims count for additional damages arises out of the matter of the original complaint because once the violation of Sec. 810 was res judicata, all vouchers submitted for subsidies during the offending period were false. A ham and egg relationship is unavoidable. The original complaint contended that the payments were illegal and in applying for both operating and construction differential, subsidies under 46 USC Sec. 1171, AGAFBO members falsely represented to the government that they were not parties to any agreement in violation of Sec. 810 of the MMA, thereby making them ineligible to receive said subsidies. The False Claims amendment for additional damages is not "new matter", or a "new demand", or a "new claim", or a "new count." The case of U.S. v. Templeton, 190 F. Supp. at 183, addresses the issue raised by Judge Dooling in this regard as stated therein by Judge Wilson, "...the rule to be followed in Federal Courts is if there is an identity between the amendment and the original complaint with regard to the general wrong suffered and with regard to the general conduct causing such wrong, then the

amendment shall relate back and the statute of limitations would not avail to preclude a hearing on the merits."

Applying this rule to the case at hand, the issue is not who the original defendant was (in this case the Secretary of Commerce), but what he was being asked to do to correct the wrong suffered. The wrong suffered in this case was, in the words of Judge Friendly, "that public monies have been used to assist some citizens to hurt others in a manner inimicable to the interests of the United States" Safir I, 417 2d 972 et seq. footnote 8. Further in applying this rule the primary issue here is not the identity of the persons named as defendants at the outset but the general conduct that caused the wrong - in this case the election of the carriers;

"To continue as a party to or to conform to any agreement with another carrier or carriers by water or to engage in any practice in concert with another carrier or carriers by water which is unjustly discriminatory or unfair to any other citizen of the United States, etc..."

There is no transformation of the original complaint by adding that the illegal payments of subsidy were false, fictitious or fraudulent and subject to double damages. The payments were illegal because the competitive conduct of the recipients was illegal and because Sapphire Steamship Lines met the criteria set forth in the law to define the injured carrier.

(See Safir I supra, footnote 6)

"The district court thought that withdrawal of the subsidies was unrelated to the competitive interest of the injured line since other innocent lines could at once be admitted to the routes and subsidized. Apart from the question whether any such lines are waiting in the wings, Congress felt that subsidy payments to violators did affect the competitive position of the victim and we see no reason why we should or could reject that conclusion."

The vouchers submitted for these payments were false because the carriers held out that they had complied with the provisions of Sec. 810 when they had not.

So that the violation of Sec. 810 and the false billing that was its consequence both arose out of the same conduct, transaction or occurrence.

"In essence the amendment seeks only an amplification of the damages claimed to have arisen out of the conduct complained of in the original pleadings. The general rule in this regard is that an amendment increasing the amount of damages claimed or merely varying the prayer for relief does not state a new cause of action and may be allowed after the statute of limitations has run. 34 American Jurisprudence Limitation of Actions, Sec.265." U.S. V. Templeton, supra at 184. Also see Foman v. Davis 371 U.S. 178; Vann v. U.S. 420 F. 2d 968 (CTCL 1970); J.L Simmons Co. Inc.

V. U.S. 412 F. 2d 1360 (CTCL 1969); Tabacaleri
Cubana v. Faber C. & Gregg Inc. 379 F. Supp. 772
(SDNY 1974); Aluminum Co. of America v. Admiral
Merchants Motor Freight Inc. 16 F.R. Serv. 2d
395, 337 F. Supp. 674, 683 (DCND, Ill. 1972);
Applied Data Processing Inc. v. Burroughs Corp.
17 F.R. Serv. 2d 1097, 58 F.R.D. 149 (DCD Conn.
(1977).

The opinion of Judge Wilson in U.S. v. Templeton, supra, is the antithesis of Judge Dooling's holding in regard to "relating back." Both the period during which the wrong took place is the same and the deceitful conduct of misrepresentation was integral to the illegal acts themselves. The amounts of subsidy recovery and the method of compilation are unchanged except for the doubling of the damages.

The position of the parties here parallels the second count in the amended complaint in the "Templeton" case. In the first count of "Templeton" the court held that there was a diversity between the original complaint and the amendment because the original complaint concerned 21 loans on 22 bales of cotton, while the amended complaint is based on improper loans on 524 bales of cotton. Thus the only identity between the first count and the original complaint is the extent to which the 22 bales were included in the 524 bales and these 22 bales were the specific subject of the second count of the amendment.

When the defendant was placed on notice that he was charged with wrongful action relating to 22 ~~balls~~ of cotton he could not be charged with being placed on notice when he might be called up eight years later to defend himself from claims of wrongful action relating to 502 other ~~balls~~ of cotton. And so, on the first count, the test was adequacy of notice. The same logic was applied by Judge Friendly in Rosenberg v. Martin, 478 F. 2d 520, 526, 527. Assault was never mentioned in the original complaint and defendant Martin was never on notice that he would be faced with this new and different charge.

The citation of Rosenberg v. Martin, supra, clarified by indirection the consistency of appellant's position in regard to constructive notice. As Judge Dooling points out on page 10 of Appendix A, this appellant raised in the Court in 1969 as well as before the Chief Hearing Examiner that the United States recover all subsidies and that on some basis he should participate in or benefit by the recovery. Judge Dooling continues on pages 10, 11 and 12 to discuss appellant's notice to the defendants of his intentions to file a later action under 31 U.S.C. 231 et seq. after the extent of the recoveries were to be decided upon. Indeed, as pointed out by Judge Dooling, Appendix A, page 12, appellant looked for guidance here in the 2nd Circuit as to his standing under the statute 31 U.S.C. 231 et seq. in 1972.

This was within 6 years of the time that 90% to 95% increments of each subsidy voucher had been paid out. While this Court did not elect to address the question at that time the issue was briefed by the defendant carrier appellees who were certainly on notice at that time that this appellant intended to amend his original complaint as soon as the delaying tactics of the Department of Commerce and its then secretary Maurice Stans would end and the Nixon administration would comply with the mandates of this Court in *Safir I* and *Safir II*.

This Court in denying relief of this appellant in *Safir v. Blackwell, et al*, 469 F. 2d 1062 2d Cir. 1972 (see p. 101 Appendix D3) in its opinion continued to prod the Commerce Department for its decision - a decision which was not final until more than 6 years had elapsed from the inception of this suit and 3 weeks after the ex-president resigned.

So, unlike *Rosenberg v. Martin*, supra adequacy of notice of a False Claims action did exist although in the court below the defendants, both carriers and government, urged laches. The case of *Holmberg v. Armbrrecht* 327 U.S. 392 is of considerable significance here and appellant quotes from the text:

"Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced - on equity founded upon some change in the condition or relations of the property or the parties.' *Galliher v. Caldwell* 145 U.S. 368 and 373.

'If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal of equity because of mere lapse of time.'

'Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on its part, the bar of the statute does not begin to run until the fraud is discovered though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the other party." Bailey v. Glover 21 Wall 342; 348 ("Holmberg" at 397).

Except for his own innate sense of fairness there can be no better explanation for Judge Dooling's incorporation of Annex A as part of his decision than the citation above - his demurrer notwithstanding. Annex A will be further addressed in the related appeal in 77-7626.

One further point should be mentioned. On page 9 of Appendix A Judge Dooling refers to Docket 68 C 643 as a "closed case." Appellant submits as set forth in Appendix F^{P.106} attached

hereto that the government defendants demanded that the case be dismissed with prejudice in 1975. Judge Dooling denied their plea at that time as shown in his decision. See Appendix G. *P. 112*
The government interposed no further objections to the case remaining open and the government did not appeal as they were invited to do by Judge Dooling. Further, in like manner to its waiver in favor of this appellant in docket 77 C 1093 EDNY, the United States attorney has indicated that the government will waive its right to prosecute under 31 U.S.C. 232 (c) by the affidavit of Gilbert Fleischer, Esq. of the Department of Justice if appellant is successful here. See Appendix H p. *115* and *116*.

CONCLUSION

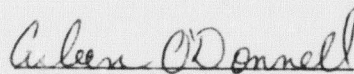
For the reasons set forth above appellant prays that this Court will reverse the court below and remand this case with instructions to grant the motion to amend docket 68 C 643 with the False Claims Amendment and for such other relief as the Court may deem appropriate.

Respectfully submitted,

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February 1978

I Arleen O'Donnell hereby certify that I have this 14th day of February, 1978, mailed by first class pre-paid postage a copy of this brief and appendix to all counsel of record in this proceeding.


ARLEEN O'DONNELL

DATED: This 14th day of
February, 1978.



REGINA E. LEVINE
Notary Public, State of New York
No. 24-4013876
Qualified in Kings County
Commission Expires March 30, 1979